

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Duke Energy Oakland, LLC

Docket No. ER01-3034-003

ORDER ON COMPLIANCE FILING

(Issued March 5, 2004)

1. This order addresses the refund report (refund report) submitted by Duke Energy Oakland, LLC (Duke Energy), in order to comply with the Commission's order issued in this proceeding on February 1, 2002.<sup>1</sup> The February 1 Order directed Duke Energy to calculate, issue, and submit a refund report itemizing amounts it may owe to Pacific Gas & Electric Company (PG&E) under a revised Reliability Must Run (RMR) Agreement (RMR Agreement) with the California Independent System Operator Corporation (CAISO). At issue here is the refund period from October 1, 2000 through December 31, 2001 (refund period). As discussed below, we will reject the refund report and direct Duke Energy to recalculate refund amounts due in this proceeding after a final order has been issued in the California refund proceeding in Docket Nos. EL00-95-045 and EL00-98-042 (California Refund Proceeding).

2. This order benefits customers by helping to ensure that the refund process is properly used to achieve just and reasonable rates.

**BACKGROUND**

3. Under Duke Energy's RMR Agreement with the CAISO, a RMR unit may operate under either Condition 1 or Condition 2. When a unit operates under Condition 2, it receives essentially a cost-of-service rate for the RMR service provided and cannot retain

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<sup>1</sup> Duke Energy Oakland, LLC, 98 FERC ¶ 61,114 (2002) (February 1 Order).

revenues from participation in market transactions.<sup>2</sup> This is in contrast to a unit operating under Condition 1, which retains revenues from participation in the market. All units owned by Duke Energy operate under Condition 2 of the RMR Agreement. When the CAISO issues a dispatch notice to a Condition 2 RMR unit, Duke Energy, as the unit's owner, must bid the required energy into the next available market. Duke Energy then invoices the CAISO at the formula rate contained in the RMR Agreement, and the CAISO, in turn, invoices the responsible utility, in this case, PG&E. After PG&E pays the invoiced amount to the CAISO, the CAISO passes through payment to Duke Energy.

4. Pursuant to the RMR Agreement, Duke Energy must subtract from the invoices any amounts received by or due from its Scheduling Coordinator, in this instance, PG&E, in connection with market transactions and non-market transactions. Under the RMR Agreement, any amounts received by or due to Duke Energy in connection with market transactions are referred to as Scheduling Coordinator Credits (SC Credits) and must be applied as a credit on Duke Energy's RMR invoices to the CAISO. This procedure is intended to ensure that Duke Energy, as a Condition 2 owner, is not paid more than once for the energy dispatched and paid for by the CAISO, by retaining the market payment Condition 2 owners receive from the Scheduling Coordinator for the same energy.

5. On September 10, 2001, as amended on September 20, 2001, Duke Energy submitted proposed, revised rate schedule sheets to the RMR Agreement.<sup>3</sup> The proposed revisions included changes to certain plant-specific schedules, altering the rates charged under the RMR Agreement (revised rates). By delegated letter order issued October 17, 2001,<sup>4</sup> the revised rates were accepted for filing, with certain sheets effective October 1, 2000 and others effective January 1, 2001.

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<sup>2</sup> In general, RMR agreements specify the rates, terms, and conditions by which power plant owners in California provide RMR service to the CAISO by dispatching designated units at certain power plants at the direction of the CAISO.

<sup>3</sup> These revisions were made pursuant to the Terms of Agreement (TOA), dated July 25, 2001, among Duke Energy, the CAISO and PG&E. The TOA was necessitated by Duke Energy's rehabilitation, at the request of the CAISO, of one of its RMR units at Duke Energy's Oakland power plant. Because this unit operates under Condition 2, DEO is prevented from recovering, through market sales, any cost associated with that unit's rehabilitation. Duke Energy recovers these rehabilitation costs through revisions to its RMR Agreement with the CAISO. The TOA details the justification for the revisions to the RMR Agreement and sets forth the parties' express agreements as to the propriety and effective dates for the revisions.

<sup>4</sup> Delegated letter order, Docket Nos. ER01-3034-000 and ER01-3034-001 (October 17 Delegated Letter Order).

6. On November 15, 2001, PG&E filed a request for rehearing of the October 17 Delegated Letter Order. On rehearing, PG&E argued that the revised rates would result in a refund in excess of \$20 million and that, accordingly, the Commission should require Duke Energy to issue refunds and submit a refund report.

7. In response to PG&E's rehearing request, Duke Energy stated that it did not disagree in principle with PG&E. Duke Energy maintained that, to the extent it has collected amounts in excess of the revised rates since the effective dates indicated in the October 17 Delegated Letter Order, it would calculate and make refunds, with interest, in accordance with Commission regulations and file a subsequent refund report.

8. Accepting the parties' representations, in the February 1 Order, the Commission directed Duke Energy to calculate any amounts collected in excess of the revised rates from the effective dates thereof, plus interest; make refunds within 30 days of issuance of the order; and file a report within 30 days of making such refunds.

### **REFUND REPORT**

9. As indicated above, pursuant to the February 1 Order, Duke Energy submitted the refund report on April 3, 2002. In its refund report, Duke Energy maintains that for the entire refund period, *i.e.*, October 1, 2000 through December 31, 2001, it did not receive from CAISO any amounts in excess of the revised rates, and that therefore, no refunds are due. Toward further explanation, Duke Energy attaches its March 4, 2002 letter to the CAISO, in which Duke Energy contends that the SC Credit portions of the RMR invoices are incalculable at this time. Duke Energy contends that the ongoing California Refund Proceeding, which involves the CAISO, makes the amount of the SC Credit incalculable because the market clearing prices upon which the SC Credit is computed are being litigated in that proceeding.<sup>5</sup> Furthermore, Duke Energy states that PG&E has not paid any RMR invoices submitted by Duke Energy since the production month of January 2001. Duke Energy argues that it should not be required to refund monies that it has never collected. Accordingly, Duke Energy maintains that PG&E is due no refund for the entire refund period.<sup>6</sup>

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<sup>5</sup> The market clearing prices in question in the California Refund Proceeding cover the period from October 2, 2000 through June 20, 2001 (California refund period), which overlaps with the refund period at issue in this proceeding.

<sup>6</sup> We note that in Duke Energy's letter to the CAISO, Duke Energy mistakenly indicates that the refund period runs from October 1, 2001 through December 31, 2002.

10. Also attached to Duke Energy's refund report are a summary of adjusted RMR income and copies of revised Duke Energy RMR invoices for the refund period.

### **NOTICE OF THE FILINGS AND RESPONSIVE PLEADINGS**

11. Notice of the refund report was published in the Federal Register,<sup>7</sup> with interventions, comments and protests due on or before April 24, 2002. On April 23, 2002, the CAISO submitted a "late filed motion" to intervene. On April 24, 2002, PG&E, CAISO, the California Public Utilities Commission, and the California Electricity Oversight Board filed a joint protest.<sup>8</sup> On May 16, 2002, Duke Energy filed an answer to the protest. On May 31, 2002, the protestors filed a response to Duke Energy's answer. On June 18, 2002, Duke Energy filed another response to the protestors' answer to answer.

### **October 2000 through January 2001**

12. For the October 2000 through January 2001 portion of the refund period, the protestors claim that Duke Energy invoiced the CAISO and collected from PG&E \$28,619,083 in RMR payments. Protestors contend that Duke Energy should have collected only \$4,223,506 and that PG&E is now due a refund of \$24,395,577 for the October 2000 through January 2001 portion of the refund period. According to protestors, when Duke Energy originally submitted to the CAISO the RMR invoices for the first portion of the refund period, invoices properly included \$24,909,930 in SC Credits, based on applicable market prices. Protestors maintain that these RMR invoices were approved by the CAISO and fully paid by PG&E to the CAISO and by the CAISO to Duke Energy. The protestors state that Duke Energy's refund report does not reflect the SC Credits for October 2000 through January 2001. They argue that Duke Energy cannot now remove the SC Credits from its refund report calculations merely because the market clearing prices for the refund period might be subject to change in the California Refund Proceeding. The protestors argue that the market prices Duke Energy used to calculate SC Credits in the original invoices were then, and presently remain, the only lawfully filed rates. They state that, unless and until those rates are modified, they are in

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<sup>7</sup> 67 Fed. Reg. 18,882 (2002).

<sup>8</sup> Unless otherwise indicated, these entities will be referred to collectively as the "protestors."

effect, and the RMR Agreement obligates Duke Energy to use them to calculate SC Credits.<sup>9</sup>

### **February 2001 through December 2001**

13. For the February 2001 through December 2001 portion of the refund period, the protestors concede that Duke Energy's RMR invoices for that period have not been paid by PG&E, and that, accordingly, Duke Energy collected no amounts for that period in excess of the revised rates. However, the protestors claim that this is because the CAISO properly rejected Duke Energy's invoices for various reasons, including Duke Energy's failure to apply the required SC Credits. The protestors state that, because PG&E is only required to pay the RMR invoices approved and submitted to it by the CAISO, and the CAISO did not submit Duke Energy's invoices to PG&E (because the CAISO had rejected Duke Energy's invoices to it), PG&E was never required to pay them.

14. In short, the protestors argue that Duke Energy owes a refund of over \$24 million for the First Refund Portion (October 2000 through January 2001), since this was the "only time it was paid 'amounts in excess of the revised rates.'"<sup>10</sup>

## **DISCUSSION**

### **Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the CAISO's timely, unopposed motion to intervene serves to make it a party to this proceeding.<sup>11</sup>

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest and answer unless otherwise

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<sup>9</sup> Moreover, the protestors argue that, in adjusting its calculation of SC Credits, Duke Energy improperly attempts to litigate matters, such as those involved in the California Refund Proceeding, that are not at issue here. The protestors state that there are several RMR-related matters, including PG&E's bankruptcy proceeding, that are nevertheless beyond the scope of this proceeding.

<sup>10</sup> Protestors' joint protest at 7.

<sup>11</sup> Although the CAISO styled its motion as a "late filed motion to intervene," we note that its filing was timely under the notice of the refund report.

ordered by the decisional authority. We are not persuaded to accept Duke Energy's answers and the protestor's response and will, therefore, reject them.

### **Commission Determination**

17. We will reject Duke Energy's refund report. The California Refund Proceeding will determine the market clearing prices for the portion of the refund period from October 2000 through January 2001. These market clearing prices are reflected in the refund report as the SC Credits and, therefore, are an integral factor in the calculation of refunds due in this case. Because the outcome of the California Refund Proceeding will affect the refunds due in this case, we will direct Duke Energy to recalculate, with interest, amounts collected in excess of the revised rates since their effective date, issue refunds accordingly, and file another refund report, after a final order has been issued in the California Refunds Proceeding (California order). Duke Energy's recalculation of SC Credits, and attendant refunds, must be based upon the market clearing prices set in the California Refund Proceeding and California order. Duke Energy must issue any refunds due in this proceeding within 30 days of the date of the California order and submit a refund report within 30 days of issuing such refunds. The Commission believes that proceeding in this manner will utilize the refund process in an efficient manner, while ensuring the ultimate realization of just and reasonable rates.<sup>12</sup>

18. We further take this opportunity to note that, regardless of the underlying reasons for any nonpayment by PG&E, the February 1 Order clearly directs Duke Energy to calculate and issue refunds for any amounts collected in excess of the revised rates within the relevant refund period.<sup>13</sup> Accordingly, when Duke Energy calculates refunds for the refund period of October 1, 2000 through December 31, 2001, the calculation shall be based on amounts actually collected in excess of the revised rates for the entire refund period.

### **The Commission orders:**

(A) Duke Energy's refund report is hereby rejected.

(B) Duke Energy is hereby directed to, within 30 days of the date a final order issues in the California Refund Proceeding, recalculate amounts actually collected in

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<sup>12</sup> Regardless of whether SC Credits are incalculable at this time, we note that Duke Energy ultimately would have to recalculate refunds due in this proceeding as a result of the California Refund Proceeding.

<sup>13</sup> February 1 Order, 98 FERC ¶ 61,114 at 61,339.

excess of the revised rates, including interest, since the effective date of the revised rates, make refunds accordingly, and, within 30 days of making such refunds, submit a refund report, as discussed in the body of this order. Duke Energy's recalculation and issuance of refunds, and corresponding refund report, must reflect SC Credits based upon the market clearing prices set in the California Refund Proceeding, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.